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No. 00-763

IN THE -

Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

RAYMOND MICHAEL RIPPLE
(Counsel of Record)
DONNA L. GOODMAN
Legal D-7012
E.I. DU PONT DE NEMOURS AND COMPANY
1007 Market Street
Wilmington, DE 19898
(302) 773-3072
Counsel for Respondent

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently 14 publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. is a consolidated subsidiary, and the following companies are companies in which DuPont holds a minority, non-controlling interest:

Bionova Holding Corporation
Celgene Corporation
DuPont Photomasks, Inc.
Hologic, Inc.
Hudson Technologies, Inc.
ImproveNet, Inc.
Kos Pharmaceuticals, Inc.
Maxygen Inc.
SciQuest.com
Shaman Pharmaceuticals Inc.
Syncor International Corporation
Trigon Healthcare, Inc.
WebMD Corporation

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BRIEF FOR THE RESPONDENT

INTRODUCTION

Statutory Scheme

The civil rights acts of the last 50 years have grown to a complex and even intricate corpus of law. The Civil Rights Act of 1964 ("Act")[1] largely limited remedies to injunctive and affirmative action relief under Title VII. *See* Pub. L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259. Reinstatement and back pay were included as one of the potential remedies. *Id.* "Front pay" is neither defined nor even used in the statute.

The Equal Employment Opportunity Act of 1972 added the language "any other equitable relief," essential to the resolution of this case to section 706. Pub. L. 92-261 § 4, Mar. 24, 1972, 86 Stat. 104. Nevertheless, Title VII remedies remained equitable in nature. *United States v. Burke*, 504 U.S. 229, 238 (1992).

[1] Covers 1964 Act and amendments, except when specifically noted.

A dramatic change occurred with the passage of the Civil Rights Act of 1991. *See* Pub. L. 102-166, Title I, § 102, Nov. 21, 1991, 105 Stat. 1072. Among the changes wrought by the 1991 Act were the introduction of compensatory and punitive damages, limitations or caps on the amounts of those damages, the introduction of jury determination of those damages, and the concomitant division of responsibility between judge and jury. These changes all apply to the case at bar. *See* 42 U.S.C. § 1981a.[2]

Particularly applicable to the issue presented in this case is the cap that limits compensatory damages "*for future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added). The 1991 Act sets up a sliding scale of caps on compensatory damages and punitive damages. *See* 42 U.S.C. § 1981a(b)(3)(D). Under that section, large companies, such as DuPont, are subject to the maximum of $300,000 in compensatory damages and in punitive damages. Plaintiff had the option of a jury trial on compensatory and punitive damages, *see* 42 U.S.C. § 1981a(c), but chose a bench trial.

The 1991 Act also contains a very precise statement of exclusions from compensatory damages—"back pay, interest

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[2] In addition to the very structure of the 1991 Act, its legislative history indicates an intent of Congress to transform Title VII into a tort-like statute. P.L. 102-166, House Report No. 102-40 (II), p.104 (May 17, 1991) (dissenting views). This resemblance to a traditional tort action is now magnified from the time of the 1972 Act, although in one of the earliest appellate cases after that 1972 Act the Fourth Circuit noted that a prospective award in a Title VII case is analogous to that awarded in an ordinary tort case. *Patterson v. The American Tobacco Co.*, 535 F.2d 257, 269 n.10 (4th Cir.) *cert. denied sub nom. American Tobacco Co. v. Patterson*, 429 U.S. 920 (1976) (citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." 42 U.S.C. § 1981a(b)(2). Excluded from the definition of compensatory damages, these remedies remain subject to the equitable powers of the district court. Section § 706(g) specifically sets forth the equitable remedies available to the district court: injunction, affirmative action (including reinstatement), back pay and other equitable relief. 42 U.S.C. § 2000e-5(g)(1).

The lone question presented, whether the statutory limits placed on compensatory damages by Congress nearly a decade ago includes front pay, is a very narrow one.

Front Pay

The term "front pay" is not found in the Act. This Court has not directly addressed the nature of front pay, much less its place, if any, in the current legislative scheme of remedies under the civil rights statutes. Only in passing has this Court mentioned its existence in lower court case law, as in a footnote in *Burke*, 504 U.S. at 239 n.9, where it was noted that some courts allowed wrongfully discharged Title VII plaintiffs, when reinstatement was not feasible, "to recover 'front pay' or future lost earnings." *Id.* at 239 n.9 (citation omitted).[3]

Lower courts have viewed front pay as a type of prospective relief, often in lieu of reinstatement. *See Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 n.9 (10th Cir.), *cert. denied sub nom. Ortho Biotech, Inc. v. Medlock*, 528 U.S. 813 (1999) (noting that front pay is sometimes granted absent

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[3] Earlier, this Court noted in passing in a footnote of the "possibility of an award of monetary damages (sometimes designated 'front pay',)" but suggested that it was an unresolved issue. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 778 n.38 (1976). In any event, front pay has never been subject to the degree of analysis presented here.

a request for reinstatement).[4] This form of relief assumes plaintiff would have continued on in her position, absent an unlawful act by her employer. The lower courts have often awarded monetary damages under the name of "front pay" when reinstatement of the plaintiff was deemed inappropriate or impractical and an award of statutory back pay failed to make the plaintiff whole. *See e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir.), *cert. denied*, 510 U.S. 1164 (1994); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1278-79 (10th Cir. 1988). It is an estimation of the monetary award equal to the gain plaintiff would have received if she had been reinstated. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998).

The lower courts have generally calculated front pay by discounting the present value of the difference between the earnings a claimant would have received in her old position and the earnings she can be expected to receive in her present and future employment. *McKnight v. General Motors Corp.*, 908 F.2d 104, 116 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). ("*McKnight I*"). The lost earnings are those likely to occur between the date of judgment and the time when the claimant can assume a new position. *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977).

The claimant has a duty to find other employment and to keep it once it is located. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999). So, although necessarily speculative in nature, front pay is an award of limited duration. *Williams*, 137 F.3d at 954.

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[4] The lower courts have generally recognized reinstatement as the preferred remedy. *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1020 (9th Cir. 2000); *Gotthardt v. Nat'l. R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999).

STATEMENT OF THE CASE

This Title VII action, alleging sexual discrimination, was originally filed by Sharon B. Pollard ("Petitioner" or "Pollard") against E.I. du Pont de Nemours and Company ("Respondent" or "DuPont") in the United States District Court for the Western District of Tennessee in 1995. Pollard also alleged state law claims of intentional infliction of emotional distress, negligence, and loss of consortium.[5] After a trial to the court without jury, the district court awarded Petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap contained in 29 U.S.C. § 1981a(b)(3), and attorney fees and costs on the discrimination claim. *Pollard v. E.I. du Pont de Nemours and Co.*, 16 F.Supp.2d 913, 924 (W.D.Tenn. 1998). [J.A. 77-78].

The district court noted that the $300,000 cap was insufficient to compensate Pollard for all future damages, including "psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement." [J.A. 77]. Nevertheless, the district court never made a finding that reinstatement was impractical nor the sum of front pay it would have awarded.

The only part of the district court's opinion relevant to the issue presented here is a short statement in a footnote that the court was bound by the Sixth Circuit's position that front pay is subject to the damage limitations contained in 28 U.S.C. § 1981a(b)(3). *Pollard*, 16 F.Supp. at 923 n.19. [J.A. 77].

A timely appeal was taken by DuPont to the United States Court of Appeals for the Sixth Circuit. Pollard filed a cross-appeal on the limitation of front pay damages and the summary judgment dismissing her state law claims. The

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[5] All of these were dismissed at summary judgment and are not at issue here.

Sixth Circuit reversed the district court's summary judgment in favor of DuPont on the state law claim of the intentional infliction of emotional distress and remanded this claim. In all other respects, the Sixth Circuit affirmed the judgment of the district court. The panel decided it was bound by prior circuit precedent concerning the cap on front pay. [J.A. 100-01].[6]

As to the question presented to this Court, the Sixth Circuit panel affirmed the district court's decision that front pay was an element of future pecuniary losses under 42 U.S.C. § 1981a, and thus was subject to that section's monetary cap of $300,000 on compensatory damages. Both the district court and the Sixth Circuit panel felt bound by an earlier panel decision, *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *cert. denied*, 525 U.S. 822 (1998), that placed front pay under the statutory cap on damages. *Pollard v. E.I. du Pont de Nemours and Company*, 213 F.3d 933, 945 (6th Cir. 2000). [J.A. 100].

Hudson, the basis for the Sixth Circuit's decision in this case, was a Title VII sex discrimination action. While one of the principal issues there was whether the statutory cap on compensatory damages applied to the entire action or per claim, an issue not presented here, the court also decided that the cap on "future pecuniary losses" under 42 U.S.C. § 1981a included "front pay" awarded in lieu of reinstatement. The *Hudson* court concluded that front pay was a "future pecuniary loss" because it is a measure of damages the plaintiff would have received "but for the discrimination." *Hudson*, 130 F.3d at 1203.

The *Hudson* court noted that front pay is not an equitable remedy specifically authorized by § 706(g) of Title VII, the enforcement/remedial section of the Act. 42 U.S.C. § 2000e-

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[6] Pollard's petition for rehearing, having gained less than a majority of the entire court for such a hearing, was returned to the original panel, which denied the petitions. [J.A. 105].

5(g). The court also noted that in the history of the adjudication of the Act, front pay had "always been the heart of 'future pecuniary losses' in discrimination cases." Thus, the *Hudson* court concluded that front pay is a "future pecuniary loss," not otherwise authorized by § 706(g), and was subject to the statutory cap on damages.

Since the decision of the Sixth Circuit in this case, DuPont has satisfied the judgment in the federal claims, which would have included any claim for punitive damages. DuPont has granted Pollard an incapability pension. The district court has stayed adjudication of the state law claim pending decision of this Court.

The Petition for Writ of Certiorari was filed with this Court on November 13, 2000 and granted by this Court on January 8, 2001.

SUMMARY OF ARGUMENT

The remedial scheme of redress under Title VII, as it appears on the face of the United States Code since 1991, is clear and sensible. On the face of the Code, the respective roles of the judge and jury are clearly and quite conventionally defined. The jury is the primary fact finder, determining liability. It also determines compensatory damages, including damages for future pecuniary losses—a conventional form of legal damages. It also determines punitive damages.

The trial court is concerned, as before, with the availability of equitable relief. It determines whether reinstatement is warranted. In addition, the court determines whether an essentially restitutionary remedy, back pay, is due.

There is no overlap in the functions of the judge and jury. There is nothing particularly unusual about the remedial scheme.

Petitioner's argument for an interpretation contrary to this common-sense reading of the remedial scheme is based

essentially on the fact that before 1991 many lower courts had held that where reinstatement was not appropriate, it was within their equitable power to grant prospective monetary relief, front pay, in lieu of reinstatement. And indeed, a trial court faced with a statute limited to equitable relief and frustrated by one or both parties' inability to make reinstatement feasible, might reasonably conclude that it enjoyed sufficient equitable powers to grant to a plaintiff a form of substitutionary relief that would ordinarily be regarded as legal in character, front pay.

Where there is no jury available to award legal relief, it is perhaps understandable that an equity court, having determined liability, may also find it within its power to grant some monetary relief.

However, that rationale does not survive the 1991 amendments. Whatever necessity militated toward allowing a trial court to award certain forms of legal relief in the absence of a jury do not survive the remedial scheme that Congress created in 1991. Congress has made the jury the primary fact finder. And Congress has assigned to the jury the role of awarding compensatory damages, including damages for future pecuniary losses. It is one thing for a trial court in equity, finding the plaintiff without any alternative, to find within itself the power to award a form of relief needed to make the plaintiff whole. It is quite another thing for a trial court to aggrandize, under the heading of its equitable powers, the ability to award a remedy that is historically legal, and properly the subject of a jury determination, when there is a jury available to entertain the matter. Whatever power a court in equity may have had to award front pay before 1991 has been eliminated with the ready availability of a jury trial since 1991.

Moreover, in the alternative, it is doubtful that even before 1991, courts properly awarded front pay as an equitable remedy. At the time of the separation from England,

Chancery did not regularly grant monetary relief in lieu of specific performance or injunctions. Without broad Congressional grant of such authority, monetary relief in lieu of specific performance or injunction must be a legal damage. Here, future monetary relief, whether called front pay or future lost earnings or anything else, is a legal remedy. It may still be recovered, but only as legal damage, most likely as a future pecuniary loss, an element of compensatory damages.

ARGUMENT

I. FRONT PAY IS A COMPENSATORY DAMAGE UNDER TITLE VII

In 1991, Congress enacted a fundamental change to the remedial scheme under Title VII. Among other things, Congress created for the Title VII plaintiff a right to a jury trial and the right to have a jury award compensatory damages, including damages for future pecuniary losses. This creation of a right to a jury trial necessarily had a major impact on what had heretofore been the responsibilities of the trial court in a Title VII case. Whereas before the 1991 Act, the trial judge was the primary fact finder, after the 1991 enactment, the primary fact finder was now the jury. The historic fact finding power of the trial court in Title VII cases must give way to the primacy of the jury.

Not surprisingly, given the shift from judge to jury, the 1991 enactment, and particularly section 1981a, also had an effect on the trial court's remedial authority. Congress having expressly assigned to the jury the responsibility to award compensatory damages, including future pecuniary losses, a trial court can no longer claim that the power to award the classical form of future pecuniary damages known as front pay is within its "equitable power." In this area as well, the court's prior authority must give way in the face of the primacy of the jury under Congress' remedial scheme.

This Court has recognized that the 1991 Act wrought fundamental and dramatic changes in the process of remedies when it observed that the addition of jury trials and compensatory and punitive damages "signals a marked change in its [Congress'] conception of the injury redressable by Title VII." *Burke*, 504 U.S. at 241 n.12. Again, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court recognized that the 1991 Act "significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to back pay under prior law." *Landgraf*, 511 U.S. at 253-54. The Court went on to note that the 1991 changes really created "a new cause of action." *Id.* at 283. Indeed, it is correct to characterize the change wrought in the remedies provisions of the Act as "dramatic," as the Fifth Circuit did in the opinion affirmed by this Court in *Landgraf. Landgraf v. USI Film Products*, 968 F.2d 427, 433 (5th Cir. 1992).[7]

As noted above, even a cursory review of the 1991 Act and its predecessors reveals that changes to the statutory structure, especially as to remedies, were fundamental. Monetary damages were added to potential remedies. A jury was added to the adjudicatory process, to pass on the question of damages.

A. Front Pay Is Included In Damages For Future Pecuniary Losses Under Section 1981a(b)(3), And Is Not A Form Of Equitable Relief Under Section 706(g).

Both parties would agree that a plain meaning of section 1981a is largely dispositive of the question presented. [Pet. Br. 17]. However, Petitioner's analysis and conclusion are in

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[7] In a later case, the Fifth Circuit noted that the 1991 Act "made fundamental changes in both the procedures and remedies available to Title VII litigants." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

error, for they are far from the plain meaning of section 1981a.

A key to deciding this case and a notable addition to the remedies scheme of the 1991 Act is the term "future pecuniary losses" as an element of compensatory damages. 42 U.S.C. § 1981a(b)(3). On the face of that Congressional language, front pay or the remuneration for future lost earnings is clearly an element of "future pecuniary loss" and thus part of compensatory damages capped by the statute.

1. *The Plain Language of Future Pecuniary Loss Includes Sums for Future Earnings, Front Pay*

Rather than focusing on the plain language of section 1981a, Petitioner attempts to weave an intricate web of statutory definition, curiously attempting to define "compensatory damages" by its exceptions [Pet. Br. 17], by a set of presumptions [Pet. Br. 18], by snippets of legislative history [Pet. Br. 18-20], by sharp criticism of the *Hudson* case [Pet. Br. 22-25], and a few other disconnected arguments. Pollard is clearly wrong.

Petitioner largely ignores the plain meaning of one of the key terms of the new provision: "future pecuniary losses." It is that term which conveys the real change in the organization of damages under the new remedies regime of the 1991 Act.

It is a maxim of statutory construction that a legislative term, unless otherwise defined, will be interpreted as taking its ordinary, contemporary and common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). This ordinary or plain reading must govern, absent persuasive reasons to the contrary. *Burns v. ALCALA*, 420 U.S. 575, 580 (1975); *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 465 (1968). It must be clear that Congress intended a term to mean something quite different for the ordinary, plain meaning to be discarded. *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Given its plain and ordinary meaning, "future pecuniary losses" must relate to monetary losses in the future. Even without resort to the dictionary, the meaning of these three words is clear on their face. Indeed, the *Hudson* court was correct when it noted that "future pecuniary losses" must mean, at the least, "money which will be lost at a later time." *Hudson*, 130 F.3d at 1203.

"Future pecuniary losses" is not otherwise defined in the Act; indeed, it is part of the definition of "compensatory damage" under 42 U.S.C. § 1981a(b)(3). There is nothing in the remedies provision or otherwise in the Act that would mitigate against adopting a common-sense, plain reading of the phrase to mean monetary or money losses in the future.

Recourse to the dictionary confirms the plain meaning: "pecuniary loss" means a loss of money or something of monetary value, *Black's Law Dictionary* 957 (7th Ed. 1999), or prospective advantages of a pecuniary nature. *Ballentine's Law Dictionary* 928 (3rd Ed. 1969).

There is also no well-established meaning for the term "future pecuniary losses" that would alter the plain meaning of future money losses. In fact, a search of the United States Code does not reveal *any* other use of the term.[8] Therefore, there are no real concerns that Congress borrowed terminology with accumulated "legal tradition and meaning of centuries of practice" that would form a basis for an exception to the plain meaning axiom. *Evans v. United States*, 504 U.S. 255, 259 (1992) (citing *Morissette v. United States*, 242 U.S. 246, 263 (1952)).

The legislative history of the 1991 Act is also silent as to any special meaning that Congress attached to "future

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[8] Although not used in any other provision of the Code, case law under the Jones Act, 46 U.S.C. Appx. § 688 and Death on the High Seas Act, 46 U.S.C. Appx. § 762, has used "future pecuniary losses" to describe recovery under those statutes. *See, e.g., Humble v. Mountain State Constr. Co.*, 441 F.2d 816, 820 (6th Cir. 1971).

pecuniary losses." Thus, it is beyond debate that "future pecuniary losses" refers to monetary damages to be awarded to a claimant for future losses.

The other critical term under scrutiny, "front pay," is not a statutory term, but is the type of monetary award that is part of the new future pecuniary losses rubric, and thus part of compensatory damages under the Act. Front pay is at least an element of the future monetary damages created and capped by Congress in 1991.

This facial and plain reading of the statute is essential in light of the fact that there is no meaningful and appropriate legislative history from which to glean the meaning of front pay under the new, reorganized remedies provision of the Act. Also, Petitioner's reliance on pre-1991 decisions of the courts of appeals [Pet. Br. 17] is of no avail to her in that those cases, of course, were not construing the new liability/remedy structure of the 1991 Act.[9] The cases since the 1991 Act have uniformly lacked any analysis of how the structure of the new provision changed the manner in which remedies were to be treated.

Even the legal lexicon supports the proposition that "front wages" are a form of prospective compensation. *Black's Law Dictionary* 1573 (7th Ed. 1999). In contrast, a "backpay award" is an entitlement to an employee "to accrued but uncollected wages or benefits." *Id.* at 133.

Recent attempts to counter the *Hudson* court's plain reading of the term future pecuniary losses to include front

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[9] Respondent does not contest that the lower courts have long considered front pay as a form of prospective relief. Most often used in relation to the lack of reinstatement, an award of front pay "is designed to monetize" the value of continuing in a former position. *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991). Subject to mitigation by a plaintiff, front pay is the "salary that an employee would have received" had he or she not been improperly terminated. *Shore v. Federal Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994).

pay are flawed. For example, the Seventh Circuit recently attempted to reduce the significance of the *Hudson* court's analysis by stating that future pecuniary losses could include "future medical expenses." *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (7th Cir. 2000). However, even if "future medical expenses" are "future pecuniary losses," that does not eliminate front pay as another "future pecuniary loss."

This realignment of front pay as an element of future pecuniary losses is born out by the absence of "front pay" from any provision of the statute. Members of Congress, whether or not they were aware of the use of the concept of front pay after the passage of the 1972 Act and of lower court decisions utilizing monetary awards in lieu of reinstatement, deliberately altered the prior remedial landscape. The absence of "front pay" in the 1991 Act and the creation of a broader category of damages, future pecuniary losses, reinforces the need to consider front pay as part of the natural category of items included within future pecuniary losses.

Petitioner's analysis of the plain meaning [Pet. Br. 25] of the new measure of damages, "future pecuniary losses," is shallow and misconstrues the statutory definition of "compensatory damages." Contrary to Petitioner's assertions, "compensatory damages" is not defined solely by its exclusions, Section 1981(a)(b)(2), but also by sub-section (b)(3) that includes "future pecuniary losses." This new measure of damages includes moneys formerly awarded as "front pay."

2. *This Court Should Construe This Statute To Avoid Raising Serious Seventh Amendment Jury Trial Issues.*

Two additional changes in the Act brought about by the 1991 Act reinforce the conclusion that the new remedial scheme treats front pay as compensatory damages. One, the 1991 Act radically changes the remedial scheme by not only

creating the new categories of compensatory and punitive damages, but also sets up the new institutional process of divided adjudicatory responsibility of judge and jury. Two, the jury has been allotted the decision on legal damages, 42 U.S.C. § 1981a(c), while the judge retains the equity jurisdiction.

Prior to the changes of 1991, judges performed all adjudication since remedies were limited to equity. *Landgraf*, 511 U.S. at 252. Although federal district judges did award front pay on an apparent theory that courts could fashion monetary remedies when reinstatement was deemed inappropriate, the 1991 changes in the Act made front pay, which we have shown to be prospectively compensatory, subject to the jury under the rubric of compensatory damages.[10]

Courts sitting in equity without a jury under the statute as it existed prior to 1991 may have believed they had power to grant ancillary monetary relief when traditional equity power (reinstatement) had failed or been frustrated. But, it is quite a different thing to suggest, as Petitioner does throughout her brief, that an equity court can grant a legal remedy, monetary damages, where Congress has seen fit to place a jury in the process to decide such damages. Such a position would certainly implicate the Seventh Amendment. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990). Of course, this Court should "'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998) (citing *Tull*, 481 U.S. at 417 n.3 (quoting *Curtis*, 415 U.S. at 192 n.6)).

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[10] This assumes, arguendo, that district courts had appropriate equitable powers to grant such monetary relief when reinstatement failed. We will argue alternatively below [pp. 34-41] that they did not.

The sweeping changes of the 1991 Act to remedies clearly evidence, on their face, a design to collect all compensatory damage and to have them decided by a jury. The compensatory nature of front pay puts it squarely within the embrace of future pecuniary losses as an element of the new statutory structure of compensatory damage. 29 U.S.C. § 1981a(b). As an element of compensatory damages, front pay is now subject to the statutory cap on those compensatory damages.

This conclusion is quite consistent with the dual legislative purposes of Title VII: eradicating discrimination throughout the economy and making persons whole who had suffered on account of unlawful employment discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The expanded remedial provisions both enlarge the potential penalties with both compensatory and punitive damages (in addition to equitable relief) and also expand the potential sources of remuneration to a plaintiff.

To all appearances, Congress has specifically assigned to the jury the general fact finding responsibility and the specific responsibility to determine compensatory damages, including future pecuniary damages. In light of the primacy of the jury, it would be wholely inappropriate for the district court to aggrandize for itself the responsibility for front pay, divesting the jury of its role as finding appropriate remedies within this newly restructured remedial system.

B. A Fair Construction Of The Statute Is That Front Pay Is A Legal Remedy.

The statutory definition of "compensatory damages" under Title VII specifically excludes, inter alia, "any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000-e-5(g)]."[11] Section 706(g), the

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[11] It is undisputed that all other statutory exclusions from "compensatory damages" do not apply in this case.

general equitable relief section of the Act, contains the statement that such relief includes "any other equitable relief as the court deems appropriate."

Thus, if front pay, in the context of this case, is a legal rather than an equitable remedy, front pay is not excluded from the definition of "compensatory damage." Indeed, a review of cases from this Court demonstrates that front pay, a monetary damage award, is a classic legal remedy under this Court's jurisprudence.

It is firmly established that compensatory and other monetary damages are considered legal remedies. *Terry*, 494 U.S. at 570; *Curtis v. Loether*, 415 U.S. at 196.[12] There is a presumption that monetary damages are legal remedies, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 476 (1962), or legal in nature. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).[13] To this general rule, there are two primary exceptions, recognized by this Court; neither apply to this case.

1. *Front Pay is Not Restitutionary.*

This Court has noted that monetary damages may be restitutionary and equitable in nature. *Curtis*, 415 U.S. at 197 (noting that the payment of money as "back pay" may be considered restitutionary in some cases). Restitution is designed to prevent unjust enrichment by a defendant. Restatement of Restitution § 1 (1937). As such, the measure of damages looks to defendant's gain, not to plaintiff's loss. *Id.* at cmt. a.

Front pay is not a form of equitable restitution. It does not restore plaintiff to a status quo ante, a prominent goal of

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[12] *See also Felter*, 523 U.S. at 352; *Veazie v. Williams*, 49 U.S. 134, 160 (1850).

[13] To the same effect, see cases collected in *Granfinaciera, S.A. v. Norberg*, 492 U.S. 33, 47-48 (1989). Petitioner's construction of ADEA cases is unconvincing. [Pet. Br. 24 n.23].

restitution. *Tull v. United States*, 481 U.S. 412, 424 (1987).[14] Rather, front pay is an award of damages for continuing injury.

The denomination of "back pay" as a form of equitable relief does not demand a similar treatment of front pay. Back pay has the function of restoring money unlawfully withheld since employment termination. *Albemarle*, 422 U.S. at 419. It is highly calculable and otherwise fits the mold of restitution. In addition, it has been specifically named by Congress as an equitable remedy.[15]

On the contrary, front pay is a prospective remedy and is, by that nature, somewhat speculative. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992) (*McKnight II*). The speculative nature of the award and its prospective view of damages militate to cast front pay as a legal remedy rather than restitutionary.

2. *Front Pay Is Not Incidental To Reinstatement But is Rather a Legal Remedy Instead Of Or In Lieu of Reinstatement.*

This Court also has recognized that equity courts have awarded monetary damages that are "incident to or intertwined with injunctive relief." *Tull*, 481 U.S. at 424. However, front pay, in the context under review here, does not resemble the type of relief that forms the basis for this exception to the general rule that monetary damages are legal relief.

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[14] This Court came to the same conclusion in *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (finding restitution permissible under § 205(a) of the Emergency Price Control Act of 1942 to restore to status quo ante).

[15] *See Terry*, 494 U.S. at 572 (suggesting that congressional specification of a remedy as "equitable" is at least some evidence of its nature).

This "incidental and intertwining" exception to the general rule is bottomed on the historic proposition that courts of equity had discretion to decide incidental legal claims. However, to the extent this exception is grounded on the equitable clean-up doctrine, this Court long ago rejected its application to federal courts and also rejected any "incident to equity" theory when it affirmed the right to a jury trial where equity and legal issues are presented in a single case. *Dairy Queen*, 369 U.S. at 470, 473 (money demand with injunctive relief request is a legal claim triable by jury). *See also Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508-09 (1959).

Subsequent decisions of this Court do not demand a different conclusion. In *Tull*, this Court held, "A court in equity was empowered to provide monetary rewards that were incident to or intertwined with injunctive relief." *Tull*, 481 U.S. at 424. In that case, the United States had brought an action to collect civil penalties and for injunctive relief under the Clean Water Act, 33 U.S.C. § 1251 et seq. (1988 and Supp. 1990). In deciding whether civil penalties were legal or equitable relief, the Court dismissed the argument that somehow civil penalties were incidental to or intertwined with an injunction, noting that there was a great disparity between the two forms of relief and that they were independently authorized. *Id.* at 425.

Here, under Title VII, it is clear that the claims of reinstatement and front pay are quite separate claims, one being in lieu of or as an alternative to the other. Also, there is a great disparity in size and value between reinstatement and a claim for front pay in this case.[16]

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[16] Petitioner is incorrect to intimate that the amount of front pay is fully established on the record. [Pet. Br. 21]. There have been no findings in that regard or whether reinstatement would be appropriate.

3. *A Legal Remedy in Lieu of Reinstatement Has Not Been Recognized by This Court.*

A third and submittedly specious exception to the general rule that monetary damages are legal remedies has been developing in the lower courts. Many courts that have found front pay to be an equitable remedy have done so by finding that since front pay is granted in lieu of reinstatement, a clearly statutorily designed equitable remedy, that front pay also must be equitable. *Kramer v. Logan Co. Sch. Dist. No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998)[17]

This Court, as it has not recognized front pay as a substitute for reinstatement, never has recognized front pay as an equitable remedy because it is made "in lieu of reinstatement." This Court should not adopt that proposition here.

The front pay remedy, to the extent it is an award "in lieu of reinstatement," is, in reality, only another means of compensating plaintiff for some perceived prospective harm. Such a monetary compensation does not lose its status of a legal remedy because it is awarded *instead of* an equitable remedy which cannot be accomplished. To do so would stand equity on its head. The classic rendition of equity as being available where legal relief fails would be inverted.[18]

Whatever expansive expression of equitable powers the lower courts adopted under the law prior to 1991, it need not

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[17] *See also Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998); *Thome v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986).

[18] Parenthetically, although it is less than clear in the district court's conclusions of law in the instant case, it appears that the court included front pay as an element of compensatory damages. *Pollard*, 16 F.Supp. at 923 n.19. [J.A. 77-78]. In fact, the elements of damages noted by the court, *Id.*, are well within the embrace of compensatory damages. Of course, the district court never made a finding that reinstatement was inappropriate. *Pollard*, 16 F.Supp. at 920-21 [J.A. 69].

be perpetuated. The statute as it stands today allows full recompense for past and future injury to a Title VII plaintiff. Back pay is secure under the specific grant of equitable authority under § 706(g). Any monetary damage extending beyond the date of judgment can be recovered as a compensatory damage. Front pay, rightly seen as another legal remedy, is recoverable as a future pecuniary loss.

4. *Lost Future Earnings are Compensatory Damages.*

An equally faulty analysis and confusion of theories of relief in the examination of "lost future earnings" also has beclouded the evaluation of front pay as damages. Understood correctly, front pay represents the pay a plaintiff would have earned after judgment but for a finding that reinstatement is impossible or inappropriate.[19] The Seventh Circuit, however, seriously misconstrued this concept when it held that loss of future earnings was a compensatory damage but that front pay was not. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952-53 (7th Cir. 1998). While the court correctly found that "lost future earnings" are compensatory damages, the court failed to find front pay is exactly that, a future earning.

The error of the decision lies in a confusion of lost future earning and lost earning capacity. The Seventh Circuit incorrectly used the terms interchangeably. *Id.* In reality the concepts are quite separate, as the Arizona Supreme Court has noted in criticizing the *Williams* decision. *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 798 (Ariz. 1998).[20]

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[19] See discussion of front pay at pp. 3-4 ante.

[20] The Seventh Circuit compounded the error by later finding that front pay is not capped, citing *Williams* as authority for the proposition that front pay is an equitable remedy. *Pals*, 220 F.3d at 499.

Significantly, in an earlier examination of front pay the Seventh Circuit, Judge Posner questioned the propriety of awarding a monetary award where the statute (pre-1991 Act) was confined to equitable relief. *McKnight I*, 908 F.2d at 117. The opinion also notes, correctly, that front pay "is realistically damages for lost future earnings—a legal rather than an equitable remedy. *Id.*[21]

In reality, both lost future earnings and lost earning capacity are recoverable as compensatory damages under the tort-like remedies of the 1991 Act. However, the former is clearly the same as front pay, recoverable now as a compensatory damage.[22]

5. *Loss of Future Earnings: a Measure of Legal Damages at Common Law.*

A better analysis model has always been to examine the historical context of how courts at common law have dealt with similar problems. Historically, in breach of employment contracts, plaintiffs could recover actual damages from time of breach to judgment, as well as prospective damages. Where there has been a wrongful termination of employment the measure of damages covers both lost earnings before and after judgment. A. Corbin, *Corbin on Contracts*, § 1095 (1964).[23] At common law future wages is the measure of damages for failure to pay wages "that would have been

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[21] *See also Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990) (equating front pay with "future lost earnings"); *Haskins v. City of Boaz*, 822 F.2d 1014, 1015 (11th Cir. 1987) (front pay is "prospective lost earnings").

[22] State courts seem easily to conceptually equate lost future earnings with front pay. *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1333 (Mass. 1997); *Martini v. The Boeing Co.*, 971 P.2d 45, 49 (Wash. 1999).

[23] *See also* S. Williston, *Law of Contracts*, § 1358 (3d Ed. 1968), and cases cited therein.

payable for services that would have been rendered under the contract." *Battaglia v. Clinical Perfusionists, Inc.*, 658 A.2d 680, 685 (Md. 1995). "On the other hand, past wages, in full, measure damages for failure to pay wages for services rendered prior to termination." *Id.* (Footnote omitted).[24]

Thus, at common law a breach of employment contract contains a measure of damages covering both past and prospective damages. *Pierce v. Tennessee Coal, Iron & R.R. Co.*, 173 U.S. 1, 16 (1899). As such, the prospective damages in the present case should be treated in the same manner, as normal legal remedies.

II. LEGISLATIVE HISTORY DOES NOT SUPPORT PETITIONER'S THESIS THAT FRONT PAY IS NOT SUBJECT TO STATUTORY CAPS.

Petitioner, and the Government, rely heavily on the legislative history of section 1981a to support their argument that front pay is excluded from the operation of the statutory damage caps of section 1981a(b)(3). However, if the Court resorts to the legislative history at all, it should conclude that this history fails to support Petitioner's argument. Indeed, a thorough review of the entire legislative history results in the conclusion that Congress never intended to create front pay as a remedy. Thus, if Petitioner can recover anything for front pay or future lost earnings, that sum, at most, would be an element of future pecuniary loss within the definition of compensatory damages under section 1981a, and thus be capped under that statute's formula.

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[24] To the same effect: *Stoffel v. Metcalfe Constr. Co*, 17 N.W.2d 3 (Nebr. 1945); *Mason Co. Bd. of Ed. v. State Superint. of Schools*, 295 S.E.2d 719, 724 (W.Va. 1982).

A. Congress Did Not Exclude Front Pay From Statutory Caps Of The 1991 Act.

1. *Committee reports, where they exist, are devoid of reference to front pay.*

Despite its long and complicated path to becoming law, the Civil Rights Act of 1991 comes with little traditional legislative history. There were *no* committee hearings or reports on the final version of the Act.[25] There are, however, several House and Senate Committee Reports relating to earlier, but somewhat similar, versions.

One such version, S. 2104, was passed by both the House and the Senate but then vetoed by the President. *See* S. Rep. No. 315, 101st Cong., 2d Sess 1990, 1990 WL 259315 (Leg. Hist.) (June 8, 1990). S. 2104 provided that the compensatory damages that would have been made possible by the new law excluded only backpay and interest on backpay, *see Id.*, not the enacted version's "backpay, interest on backpay, [and] any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964," *see* Pub. L. 102-166 § 102(b)(2) (1991), 105 Stat. 1071, *1073 (1991); *see also* 42 U.S.C. § 1981a(3)(b)(2) (2000) (citing 42 U.S.C. § 2000e-5(g)). The Senate Report on S. 2104 reiterated that "the bill makes clear that a court may not award as compensatory damages backpay or any interest thereon, thus avoiding the possibility of duplicative recoveries." S. Rep. No. 315, 101st Cong., 2d Sess. 1990, 1990 WL 259315 (Leg. Hist.) (June 8, 1990) (citations omitted). Front pay is conspicuously absent from this exclusion and from the S.2104 Senate Report.

When President Bush vetoed S. 2104, he did so primarily on the ground that "the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas

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[25] Petitioner does not note this fact, but rather is content largely to focus on highly suspect hearing testimony [Pet. Br. 18-19] rather than conclusions drawn in the collegial manner of committee reports.

into our Nation's employment system." Veto Message on S. 2104—Message from the President—PM 152, 136 Cong. Rec. S16457-02, 1990 WL 161663 (Cong. Rec.) (Oct. 22, 1990). President Bush feared that the new law would lead to unwarranted litigation, and he found it "neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation." *Id.* at *S16458. He strongly urged consideration of an alternative bill, H.R. 1375. *Id.*[26]

H.R. 1, yet another rejected version of the Civil *Rights Act, set forth the same exclusions from compensatory* damages as the earlier versions, namely backpay and interest thereon. *See* H. Rep. No. 102-40(I) (Apr. 24, 1991), at 112; 2 U.S.C.C.A.N. 650, 102d Cong., 1st Sess. 1991. The committee reports relating to H.R. 1 explained that "[c]ompensatory damages include, *but are not limited to*, monetary relief for humiliation, pain and suffering, other psychological and physical harm, and loss of civil rights; medical expenses incurred as a result of psychological or physical harm; and *other economic losses* and out-of-pocket costs." H. Rep. No. 102-40(I) at 74 (emphasis added). This language is certainly broad enough to include front pay.[27]

In view of Petitioner's emphasis on legislative history, it is important to note that the Committee Reports on these earlier

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[26] Another bill introduced the same day as S. 2104, H.R. 4000, contained identical language for the present purposes. *See* H.R. Rep. No. 656, 101st Cong., 2d Sess. 1990, 1990 WL 188821 (Leg. Hist.); H.R. Rep. No. 644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Leg. Hist.) The House Report on that bill, too, reiterated that "a court may not award as compensatory damages backpay or any interest thereon, thus avoiding the possibility of duplicative recoveries." H.R. Rep. No. 644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Leg. Hist.), at n.80. Again, there was no mention or exclusion of front pay.

[27] This is the same committee report noted by the Government. [Gov't. Br. 21].

bills—the only Committee Reports available—did not make reference to front pay or its exclusion from compensatory damages. Rather, front pay is conspicuously absent from all of these reports.[28]

2. *Isolated references made by legislators and advocates are not authoritative.*

Petitioner urges the Court to interpret § 1981a based on three isolated references in floor debates over the proposed legislation and comments made in committee hearings on earlier, never-enacted bills. [Pet. Br. 34, 36, 37]. This Court has, however, often expressed its concerns about reliance on interpretive memoranda and floor statements when construing a statute. Certainly statements made by individuals testifying before subcommittees of an earlier Congress, espousing their personal agenda and regurgitating what courts had been doing, have even less value in terms of construing or applying § 1981a. Such caution is especially warranted in interpreting section 1981a.

When the language of the statute is clear, resort to legislative history is patently unnecessary. Here, the relevant statute provides that "future pecuniary losses" are subject to the damage caps. Front pay is clearly such a future pecuniary loss. If, as Petitioner here argues, "that is not what Congress meant, then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously." *Conroy v. Aniskoff*, 507 U.S. 511, 527-28(1993) (Scalia, J., concurring).[29]

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[28] Petitioner relies only on partisan testimony to attempt to establish the contrary. [Pet. Br. 18-20 and n.14 and 15].

[29] *See also Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) ("when carefully

Representative Edwards and Senator Danforth introduced interpretive memoranda providing that compensatory damages "cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII." 137 Cong. Rec. H9527 (Nov. 7, 1991) (Rep. Edwards); 137 Cong. Rec. S15483, S15484 (Oct. 25, 1991) (Senator Danforth).

Neither of these advocate's statements is authoritative. In his Statement on Signing S. 1745, President Bush referred to Senator Dole's interpretive memoranda as authoritative 1991 U.S.C.C.A.N. 768, 27 Weekly Comp. Pres. Docs. 1701, 1702 (Nov. 25, 1991), not the memoranda introduced by Edwards or Danforth.[30] Senator Dole's interpretation of the Act did not explicitly exclude front pay from compensatory damages and thus from the damage caps. In fact, the section-by-section analysis incorporated into Dole's memorandum states simply that the Act "makes available compensatory and punitive damages . . . It sets an important precedent in tort reform by setting caps on those damages, including pecuniary losses that have not yet occurred as of the time the charge is filed, as well as all . . . nonpecuniary losses, whenever they occur." 137 Cong. Rec. S15473 (Oct. 30, 1991).

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read, we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate"); *West Side Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 242-43 (1990) ("[T]he dissent's reliance on the legislative history to support its interpretation of the Act shows just how treacherous that task can be. The dissent appears to agree with our view that the legislative history of the Act, even if relevant, is highly unreliable, yet the interpretation it suggests rests solely on a few passing, general references by legislators . . . . We think that reliance on legislative history is hazardous at best, but where 'not even the sponsors of the bill knew what it meant,' such reliance cannot form a basis on which to interpret the statute.") (citations omitted).

[30] This Court has often viewed Presidential statements accompanying legislation as informative and helpful in construing an act. *See, e.g., Landgraf*, 511 U.S. at 255, 256 n.9.

Although the authority of statements made in floor debates is always suspect, the legislative debates on the Civil Rights Act of 1991 are even more so because the final version of the Act was referred to the House and Senate for negotiations without ever being referred to committee. As a result, there are no agreed-upon committee reports to guide the courts or construe statements made on the floor. Absent such constraints, the legislators attempt to engage in partisan lawmaking by making self-serving statements that they know will be entered in the Congressional Record. Such statements may or may not reflect the actual goals of the legislation. As Senator Danforth warned when considering the very legislation at issue in this case:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record . . . . That is one method of trying to doctor the legislative history and influence the future course of litigation . . . . Whatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it. And if it is not written into the legislative language, it does not necessarily bind and probably does not bind anyone else . . . . [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

137 Cong. Rec. S15325 (Oct. 29, 1991). Senator Danforth concluded, "any judge who tries to make legislative history out of the free-for-all that takes place on the floor of the senate is on very dangerous grounds." *Id.* at S15346.

Usually partisan floor statements "cannot plausibly be read as reflecting any general agreements." *Landgraf*, 511 U.S. at 262. This Court has been careful to limit the value of such "floor debates." "[I]solated sentences clipped from floor debates and legislative reports" are of very limited value.

Kimel v. Florida Board of Regents, 528 U.S. 62, 89 (2000).[31] Thus, no weight should be given to Senator Kennedy's statement. Senator Kennedy commented during the debates on S. 1745 that "[c]ompensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay." 137 Cong. Rec. S15234 (Oct. 25, 1991).

Petitioner's references to Congressional hearings [Pet. Br. 18-20] are also to no avail. This Court has always been "wary" of such hearing testimony, especially from non-legislators, which are obviously prone to represent partisan or individual views and interests. *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972). Of all of the possible legislative record, this category is the least likely to evidence a general view of the legislative body.

Accordingly, to paraphrase Senator Danforth, one of this legislation's cosponsors, any statements made in testimony or on the floor of the House or Senate or in interpretive memoranda discussed above that exclude front pay from compensatory damages and the damage caps should be taken with a large grain of salt. *See* 137 Cong. Rec. S15325 (Oct. 29, 1991). The remarks are also at odds "with the current of the broader statutory history of the [relevant] provisions." *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 220 (1998).

Likewise, the meager reliance by Petitioner [Pet. Br. 18, 26] and the Government [Gov't. Br. 23] on the EEOC Guidelines is appropriate. In fact, this Court has consistently found that mere agency interpretation of federal law, such as those in policy statements, agency manuals, and enforcement guidelines, all lack the force of law and are not entitled to much deference. *Christensen v. Harris County*, 529 U.S.

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[31] *See also, Crosby v. Nat'l. Foreign Trade Council*, 120 S.Ct. 2288, 2303-04 (2000) (Scalia, J. concurring).

576, 587 (2000).[32] These guidelines are entitled only to the respect they can garner through their "power to persuade." *Id.*, (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Since the subject guideline claims to draw authority from the legislative history, as the Government acknowledges [Gov't. Br. 23], they are due no weight where this Court can examine the legislative history for itself.

B. The Legislative History of § 706(g) (42 U.S.C. § 2000e-5(g)) Does Not Support Front Pay.

A broader statutory history of § 1981a necessitates reviewing the history of earlier versions of the Civil Rights Act to which it refers. If legislative history is relevant here at all, this earlier history is relevant to the present matter because the damage caps of 42 U.S.C. § 1981a limit only *compensatory* and punitive damages, and the statute provides that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, *or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g).*" 42 U.S.C. § 1981a(b)(2) (1999) (emphasis added). Front pay is not specifically enumerated as an exclusion from the compensatory damages that are subject to the caps. Therefore, if, as Petitioner argues, front pay is not limited by the damage caps, it must fall under the rubric of "any other type of relief authorized under section 706(g)."

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[32] *See also Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guidelines that is not subject to the rigors of the Administrative Procedure Act is entitled only to "some deference"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 156-58 (1991) (interpretive guidelines do not receive Chevron-type deference); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"); *see generally 1 K. Davis & R. Pierce, Administrative Law Treatise* § 3.5 (3d ed. 1994).

The 1964 Act did not include the language, "or any other equitable relief as the court deems appropriate," so its legislative history does not speak to the scope of such relief. Front pay obviously was not within the contemplation of the drafters of the Civil Rights Act of 1964.[33]

The language that empowers a court to order "any other equitable relief as the court deems appropriate" was not added until the 1972 Act. The 1972 Act grew primarily out of two separate bills, one introduced in the Senate and one in the House of Representatives. Neither the Senate version nor the House version originally included the "any other equitable relief" language, but rather left the remedies section of the 1964 Act intact.[34] The House bill ultimately passed, but with amendments introduced by the Senate.

Perhaps the most dispositive explanation of the Senate's amendment, and thus the enacted version of this section,

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[33] The bulk of the legislative history of the 1964 Act revolves around the general need for civil rights anti-discrimination legislation. With respect to the specific provision allowing a civil suit to redress discriminatory action by an employer, the interpretive memorandum on H.R. 7152, introduced by Senators Clark and Case, the floor managers of the Senate, provides that "the relief sought would be an injunction against future acts or practices, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees or the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices . . . ." Interp. Mem. on H.R. 7152 (Apr. 8, 1964). "Section 10 (c) of the NLRA authorizes 'such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." *See Albemarle Paper Co.*, 422 U.S. at 419; *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). Again, front pay was not mentioned and apparently not contemplated.

[34] *See* Report of Senate Committee on Labor & Public Welfare, Proposed Equal Employment Opportunities Enforcement Act of 1971, S. 2515, S. 2617, and H.R. 1746, Bill Texts, Section-by-Section Analyses, Changes in Existing Law, Comparison of Bills Introduced, 92d Cong., 1st Sess. (Committee Print 1971).

comes from the section-by-section analysis of S. 2515 of the 1972 Act, introduced into the Congressional Record by Senator Williams. *See* 118 Cong. Rec. 4940 (Feb. 22, 1972). The Memorandum explains that § 706(g)(2) . . .

> is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice[,] to enjoin the respondent from such unlawful conduct and order such affirmative relief including, but not limited to, reinstatement or hiring of employees, with or without back pay[,] as will effectuate the policies of the Act. . . .
>
> *The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill in order to effectively combat the presence of employment discrimination.*

Id. at 4942 (emphasis added).[35]

Thus, this section, including the new language, was not intended to expand the relief available to victims of discrimination, but rather to preserve the available remedies,

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[35] A nearly identical explanation was adopted in the Section-by-Section Analysis of H.R. 1746, as enacted, although that analysis did not include the last quoted sentence. See 118 Cong. Rec. 7168 (Mar. 6, 1972).

and to ensure the *continued* broad exercise of discretion by courts.

After enactment of this amendment, however, courts began awarding front pay as an element of damages under § 706(g), interpreting the "any other equitable relief" language to afford them broader discretion in fashioning additional relief than they enjoyed under the 1964 Act. As the 1972 legislative history shows, however, that was *not* the intent of Congress. Furthermore, the courts erroneously categorized front pay as equitable relief.

Petitioner argues that treating front pay as compensatory damages would thwart the Congressional intent of augmenting the relief available to victims of discrimination, since applying the damage caps to front pay awards could actually result in lower damages than courts would have awarded under earlier law. [Pet. Br. at 20-21]. In reality, however, courts' awards of front pay under earlier law actually thwarted the Congressional intent of preserving rather than expanding the relief earlier available. Before 1991, courts were limited to ordering injunctive relief, reinstatement, backpay, and equitable relief. Front pay, as a legal remedy, was not available until the 1991 Act added the availability of compensatory damages. Accordingly, front pay *does* expand the relief available, even when the caps are applied.[36]

Accordingly, awards of front pay under section 706(g) were, prior to 1991, contrary to legislative intent, and contrary to established principles of equity. Such awards actually are properly characterized as compensatory damages,

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[36] It matters not that other courts have given a different interpretation of § 1981a. As explained in *Evans v. United States*, 504 U.S. 255 (1992): Error is not cured by repetition, and we do not discharge our duty simply by counting up the circuits on either side of the split. *Id.* at 294 n.7 (Thomas, J., dissenting)

which did not become available until the enactment of the Civil Rights Act of 1991.[37]

In summary, there is nothing authoritative in the legislative history of any of the relevant laws to support Petitioner's argument for excluding front pay from § 1981a's damage caps. To the contrary, a thoughtful and thorough analysis of the 1964 and 1972 legislative histories reveals that Congress did not contemplate awards of front pay under § 706(g). The lower courts somehow misjudged this Congressional intent, however, as well as the meaning of equitable relief, and apparently misread the new language as an expansion, rather than preservation, of their powers of discretion.

Accordingly, because front pay is not "authorized" under section 706(g), it is not excluded from compensatory damages. According to its clear, common and ordinary meaning, front pay is a "future pecuniary loss" subject to statutory damage limitations in § 1982(b)(3).

III. ALTHOUGH COURTS HAD HELD BEFORE 1991 THAT THEY COULD GRANT FRONT PAY AS EQUITABLE RELIEF, THEY WERE NOT CORRECT IN DOING SO.

Although we maintained above that perceived necessity may have persuaded district courts that they had authority to award front pay before 1991—and that such a rule may have had some basis, in a rather vague sense, with equity principles[38]—it was inappropriate for federal courts,

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[37] Any isolated comments by a few members of Congress have little relevance with regard to what was intended by the drafters of the 1972 Act. This Court has pointed out on previous occasions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Waterman Steamship Corp. v. United States*, 381 U.S. 252, 269 (1965).

[38] Unfortunately, the early cases from the courts of appeals after the 1972 Act are singularly deficient in analysis of their equity powers and

purporting to exercise equity powers, to claim the right to award front pay. This Court has never approved this practice and ought not approve it in this case.

We have argued above that front pay is a legal remedy as a compensatory damage under the rubric of "future pecuniary loss." In the alternative, it is submitted that, if not a legal remedy, front pay is not a type of equitable relief that federal courts have the power to grant.

It is submitted that prospective monetary relief, front pay, especially "in lieu of reinstatement," is beyond the equitable powers of the federal courts. While federal courts have some inherent powers necessary to implement statutory remedies created by Congress, they do not have any inherent power to create entirely new equitable remedies of their own. The courts' inherent equitable powers are "confined within the broad boundaries of traditional equitable relief," *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

The inherent powers of the federal courts are limited to taking steps necessary "to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823 (1996).[39] These inherent powers may, in appropriate situations, include the power to grant injunctive and other equitable relief where necessary to protect the courts'

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the effect of such limitation on the courts' ability to fashion front pay as a new remedy. *See, e.g., Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980); *E.E.O.C. v. Safeway Stores, Inc.*, 634 F.2d 1273 (10th Cir. 1980); *United States Fidelity & Guaranty Co. v. Lord*, 585 F.2d 860 (8th Cir. 1978); *White v. Carolina Paperboard Co.*, 564 F.2d 1073 (4th Cir. 1977).

[39] *See also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'") (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

integrity or ability to perform their adjudicatory functions. *See e.g. Hadix v. Johnson*, 144 F.3d 925, 937 (6th Cir. 1998). But "[a] court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. Courts may not augment a substantive remedial scheme crafted by Congress. *See, e.g., Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1497-98 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991). This principle of deference counsels restraint is resorting to inherent power in the face of Congressional enactments. *Degan*, 517 U.S. at 523.

This Court recently underscored the narrowness of the federal courts' inherent equitable powers in *Grupo Mexicano*. The question there was whether the courts had the inherent power to enjoin a defendant from transferring assets in which no lien or equitable interest was claimed, even if such a transfer might compromise the plaintiff's eventual ability to collect a judgment. The Court answered that question in the negative, emphasizing that the federal courts have never had any such power. *Grupo*, 527 U.S. at 329. The Court specifically reaffirmed its "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Id. Grupo Mexicano* squarely refutes any assertion that federal courts have free-floating inherent equitable power to grant injunctive-type relief except insofar as they have been specifically authorized by Congress. The assertedly equitable prospective monetary relief in this case should meet with a similar fate. Significantly, while *Grupo* dealt only with interim relief, the relief sought here is plenary and of potential great effect on the parties. Both substantive remedies were judicially constructed without Congressional approval.

Using the same analytical matrix as used in *Grupo*, 527 U.S. at 318, this Court should look to the acquisition of equity jurisprudence from England through Section 11 of the Judiciary Act of 1789 conferring on federal courts jurisdiction over all suits in equity. 1 Stat. 78. The equity jurisdiction

adopted at the founding of the Republic was to administer equity under the principles which "had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo*, 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).[40] Front pay as an equitable remedy is not bottomed on this historical basis. At the founding of the Republic, equity did not know the prospective money relief, now called front pay.

Justice Joseph Story, the maven of American equity jurisprudence, was emphatic that the concept of American and English equity was rather narrow: "[I]t would be a great mistake to suppose, that equity, as administered in England or America, embrace a jurisdiction so wide and extensive, as that which arises from the principles of natural justice above stated." J. Story, Commentaries *on Equity Jurisprudence*, Vol. I, sec. 2, p.2. (11th Ed. 1873). Story is very clear that there was a great divide between remedies at equity and common law; common law courts addressed damages, and equity courts were primarily involved with injunctive relief. *Id.*, Vol. I, sec. 30, p. 21.[41]

Specifically as to monetary damages, Story is quite definite that an equity court's potential remedies do not include an amount of damages, except in very narrow, limited circumstances, not presented in the instant case.[42] *Id.*, Vol. II, sec. 794, pp. 1-2 is quite clear as to this general principle:

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[40] *See also Payne v. Hook*, 74 U.S. (Wall.) 425, 430 (1868).

[41] A biographer of Justice Story has noted that Story came to these and similar conclusions well in advance of the construction of his *Commentaries* and quite close to the Judiciary Act of 1789. Gerald T. Dunne, *Justice Joseph Story* (Simon & Schuster 1970), p. 416.

[42] This is consistent with an early opinion of this Court that where an equitable claim fails, a remaining legal claim is not properly in an equity court. *Russell v. Clark's Executor*, 11 U.S. (7 Cranch) 69, 91 (1812).

> It may be stated, as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation of damages, where these constitute the sole object of the bill. For, wherever the matter of the bill is merely for damages, and there is a perfect remedy at law, it is far better, that they should be ascertained by a jury, than by the conscience of an equity judge. And, indeed, the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law. (Footnotes omitted).

Story does acknowledge three possible circumstances where monetary awards might be granted in equity. Compensation should be issued by an equity court only as incident to other relief, where there is no adequate remedy at law, or where some "peculiar equity intervenes." *Id.*, Vol. II, sec. 794, p. 2.

As to any incidental jurisdiction in equity to provide for pecuniary relief, Story is quite clear that the monetary sums must be truly "incidental" and "inseparable" to the primary equitable relief. *Id*, Vol. II, sec. 796, pp. 4-5. His example of such an incidental monetary relief is succinct:

> "So where a bill is brought by the vendor against the vendee for the specific performance of a contract of sale, and for a payment of the purchase-money, if the decree is for a specific performance, equity will decree the payment of the purchase-money also, as incidental to the general relief, and to prevent a multiplicity of suits . . . ." *Id.*

Front pay is in no way incidental to reinstatement or injunctive relief. It is, by ready admission of most lower courts, issued instead of or in lieu of reinstatement, which

arguably passes for a form of injunctive or specific performance relief.[43]

Story's other two exceptions have the same lack of effect on front pay. The "no adequate remedy at law" is totally inapplicable. In fact, in this case the application of this test would set the maxim of "no adequate remedy at law" on its head because front pay, a *monetary* award, is applied when an *equitable* remedy is unavailable. *See Id.*, Vol. II, sec. 798, p. 7.

The final exception, "where some peculiar equity intervenes," also does not apply here. Story limited it to "very special circumstances," such as fraud and special problems in specific performance. *Id.* at Vol. II, sec. 799, p. 8.[44]

Story's conclusions are confirmed by William Blackstone in his *Commentaries*, published in 1765, well before the separation of the colonies from England. Blackstone concluded that equity "mode of relief" focused on specific remedies that were modeled on method of compulsion "instead of giving damages." Blackstone, *Commentaries*, Bk. III, ch. 27, p. 438. Blackstone's discussion of jurisdiction "peculiar to the chancery" reveals nothing that would grant monetary rewards. *Id.*, at 426-28.

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[43] A strong argument has been made that reinstatement itself might not survive an historical analysis. M.S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. Ill. L. Rev. 1 (1988). However, for purposes of this argument, we will assume its viability as an injunctive-type relief, especially since Congress chose to retain it specifically in the 1991 Act. *See Terry*, 494 U.S. at 572 (noting that Congress's specification of a remedy as "equitable" is evidence of its character).

[44] Story recounts that even when monetary relief was granted in equity it was done so "either by reference to a master or by directing the issue, *Quantum Damnificatus*, which was tried by a jury. *Commentaries*, Vol. II, sec. 795, p. 4.

In addition, perhaps some of the best evidence that English law did not permit money damages from Chancery is that it took an act of Parliament in 1858 to give Chancery the power to grant compensation in conjunction with applications for specific performance and injunctive relief. Chancery Amendment Act 1858 (U.K.), 21 & 22 Vict., c27, s.3 (also called the Lord Cairns' Act). This was the first time English Chancery was given the power to award a form of damages in addition to or in substitution for specific performance or by injunctive relief. J. A. Jolowicz, *Damages in* Equity—A *Study of Lord Cairns' Act*, Cambridge L.J. 224, 231 (1975).

This historic development in equity jurisprudence was recounted as recently as last year in the House of Lords in *Attorney General v. Blake and Jonathan Cape Ltd.*, 4 All E.R. 385 (2000). Lord Nicholls in the lead judgment reviewed at some length the change in equity brought about by Lord Cairns' Act. "Section 2 empowered the Court of Chancery, at its discretion, in all cases where it had jurisdiction to entertain an application for an injunction or specific performance, to award damages in addition to or in substitution for an injunction or specific performance." *Id.* at 393.[46]

Congress has never expanded the rule of equity and the power of the federal courts to generally grant damages in lieu of equitable-type relief, as Parliament has done in England. The "body of doctrine which is to guide" the federal courts in this area is still that in existence at the time of the Judiciary

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[45] *See also* J. Freiheit, *The Breakdown of Hierarchy: Damages of Law Versus Damages in Equity*, 27 Man. L.J. 185, 186 (2000) (discussing Lord Cairns' Act and the development of Canadian Law).

[46] The Supreme Court of Canada also confirmed this change in equity in its recent opinion in *Cadbury Schweps Inc. v. FBI Foods Ltd.*, 1 S.C.R. 142 (1999). "The passage of Lord Cairns' Act in 1858 conferred on the Courts of Equity a jurisdiction to award damages in addition to or in lieu of an injunction or other specific equitable relief." *Id.* at 177.

Act of 1789, 1 Stat. 78. *Atlas Life Ins. Co.*, 306 U.S. at 568; *Gordon v. Washington*, 295 U.S. 30, 36 (1935).

Unlike in England and Canada, the jurisprudence of the federal courts in this country will not support "secondary or alternative relief of a legal nature" where a primary claim for equitable relief fails. *Alger v. Anderson* (C.C.) 92 F. 696, 710 (M.D. Tenn. 1899). Where equity fails or is frustrated, a legal claim instead of or in lieu of the failed equitable claim is not a matter of equity. *Id.* at 710, 712, 713.

These learned commentaries, and the studied case law they represent, are the wellheads of the jurisprudential tradition of this country, at least as to the nature of the reception of equity by the courts of this new country. They do not advocate flexibility in expanding the scope of the equitable powers that can be exercised by the district court. Rather, these early cases and commentaries suggest flexibility and adaptability concerning a pliant and ductile application of existing equitable powers to novel factual situations.

Here, Petitioner wrongly seeks to have this Court extend historic equitable powers to granting prospective monetary relief that is not incidental to other more traditional equitable relief. Front pay is clearly beyond the reach of traditional relief of a chancellor and thus is beyond the powers of the district court to grant.

We do hasten to add, however, that recompense for sums previously rendered under the style "front pay" can probably still be obtained by a plaintiff as a legal damage under the rubric "future pecuniary losses." 42 U.S.C. § 1981a(b)(3).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

RAYMOND MICHAEL RIPPLE
(Counsel of Record)
DONNA L. GOODMAN
Legal D-7012
E.I. DU PONT DE NEMOURS
AND COMPANY
1007 Market Street
Wilmington, DE 19898
(302) 773-3072

Counsel for Respondent

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